IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TYRONE TYLER,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 99-4825
	:	
SEPTA,	:	
Defendant.	:	

MEMORANDUM AND O R D E R

LEGROME D. DAVIS, J. NOVEMBER ___, 2002

Presently before the Court is a Motion for Summary Judgment filed by Defendant Southeastern Pennsylvania Transportation Authority ("Defendant") pursuant to Rule 56 of the Federal Rules of Civil Procedure. Also before the Court is a Response to Defendant's Motion for Summary Judgment filed by Plaintiff Tyrone Tyler ("Plaintiff"), as well as Defendant's Reply to Plaintiff's Response. For the reasons set forth below, Defendant's Motion for Summary Judgment will be granted.

I. Background and Procedural History

Plaintiff, who is African-American, was employed by Defendant as a Rail Operator from January 13, 1989, until March 11, 1998, at which time Plaintiff was discharged by Defendant. During his employment with Defendant, Plaintiff was a member of the Transit Workers Union Local 234 ("Local 234"). As a member of Local 234, the terms of Plaintiff's employment were governed by the Collective Bargaining Agreement ("CBA") between Defendant and Local 234. Section 1203 of the CBA, entitled "Drug and Alcohol Testing," provides that, in certain

circumstances, Defendant may "require an employee to submit to drug and alcohol testing on a reasonable suspicion basis," and that when such a test produces a positive result, the employee is subject to discharge.

On February 15, 1998, Plaintiff was operating a SEPTA trolley. While on duty, Plaintiff was escorted to the SEPTA Medical Department by SEPTA Supervisor Karl Beck ("Beck") and a breath alcohol test was twice administered to Plaintiff. The documented results of the two tests were a blood-alcohol concentration level of .132%, and .140%, respectively.[1] In accordance with Section 1203 of the CBA, Plaintiff was discharged by Defendant on March 11, 1998 as a result of his failing the breach alcohol test on February 15, 1998.

Following Plaintiff's discharge, Local 234 filed a grievance with Defendant protesting Plaintiff's discharge on the grounds that the testing machine was not functioning properly. The discharge of Plaintiff for failing the breath alcohol test was upheld at the administrative grievance level because Defendant's Labor Relations department concluded that the tests were properly administered and that Plaintiff's discharge was proper. On May 24, 1999, Local 234 notified Plaintiff that it would not pursue arbitration of Plaintiff's grievance because its Grievance Review Committee was of the opinion that an arbitrator would likely uphold Defendant's discharge of Plaintiff. In this letter, Plaintiff was advised that he was entitled to appeal this decision to a Grievance Review Committee, but Plaintiff failed to do so. Therefore, the matter was never arbitrated between Defendant and Local 234.

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[1] Pursuant to Pennsylvania state law, an adult who operates a vehicle when the amount of alcohol by weight in his blood is 0.10% or greater is guilty of the offense of "Driving under influence of alcohol or controlled substance." 75 Pa. Cons. Stat. Ann. § 3731(a) (2002).

Plaintiff also filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC). The EEOC dismissed Plaintiff's Charge on June 28, 1999. Plaintiff then instituted this action against Defendant by filing a Complaint on September 28, 1999.[2] Defendant filed an answer to Plaintiff's Complaint on November 14, 2000. On November 9, 2001, Defendant filed the Motion for Summary Judgment currently before this Court ("Defendant's Motion"). Plaintiff filed a Brief in Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's Brief") on December 7, 2001, and Defendant filed a Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment ("Defendant's Reply") on December 21, 2001.

II. Legal Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). "As to materiality, . . . [o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or

[2] We presume for purposes of this motion that the present action was instituted by Plaintiff within ninety days of his *receipt* of the EEOC "right-to-sue" notice, as required by Title VII. See 42 U.S.C. § 2000e-5(f)(1) (2002); Seitzinger v. Reading Hosp. and Medical Center, 165 F.3d 236, 239 (3d Cir. 1999).

unnecessary will not be counted." Id. at 248. Even where there exists a dispute as to a material fact, such dispute will not preclude summary judgment unless it is "genuine" – that is, "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

In making this determination, the evidence of the nonmoving party is to be believed, and the court must draw all reasonable inferences in the nonmovant's favor. Id. at 255. Furthermore, while the movant bears the initial burden of informing the court as to the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 323 (1986).

III. Discussion

Initially, we note that Plaintiff's pleadings, which were filed while Plaintiff was not represented by counsel, do not expressly set forth any specific legal causes of action. However, Plaintiff's Brief, filed by the attorney currently representing Plaintiff, clarifies that in this action, Plaintiff: (1) alleges that Defendant discriminated against him on the basis of race in violation of Title VII; (2) alleges that Defendant engaged in impermissible retaliatory action against him in violation of Title VII; and (3) seeks "an order to compel Defendant to arbitrate his wrongful discharge claim under the Collective Bargaining Agreement." Plaintiff's Brief ("Pl.'s Brief") at 1.

A. Racial Discrimination

Plaintiff's racial discrimination claim under Title VII, 42 U.S.C. § 2000e *et seq.*, is based upon a disparate treatment theory of discrimination. Generally, "[a] disparate treatment violation is made out when an individual of a protected group is shown to have been singled out and treated less favorably than others similarly situated on the basis of an impermissible criterion under Title VII." E.E.O.C. v. Metal Service Co., 892 F.2d 341, 347 (3d Cir. 1990).

1. Plaintiff's *Prima Facie* Case

A plaintiff can succeed on this theory if he can prove, by a preponderance of the evidence, a *prima facie* case of discrimination. Anderson v. Haverford College, 868 F.Supp. 741, 744 (E.D. Pa. 1994) (citing Metal Service, 892 F.2d at 347). To make out a *prima facie* case, Plaintiff must show that: (1) he is a member of a protected class; (2) he was qualified for his position; (3) despite his qualifications, he suffered some form of adverse employment action; and (4) an employee in a non-protected class, otherwise similarly situated, was treated more favorably than Plaintiff. See id. at 745 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 & n.13 (1973)); Jones v. School Dist. of Philadelphia, 198 F.3d 403, 411 (3d Cir. 1999).

Defendant contends that Plaintiff is unable to establish a *prima facie* case because he has not established the fourth element above – that is, he has failed to show that any SEPTA employees in a non-protected class who are otherwise similarly situated were treated more favorably than Plaintiff. Plaintiff argues that one particular former employee, David Justice, who is Caucasian, was a similarly situated employee who was treated more favorably than Plaintiff. Plaintiff alleges that "complaints had been made against Justice drinking alcohol while operating the trolley," Pl.'s Brief at 6, but has provided no documentary or testimonial evidence to support this contention. The evidence does establish that on one occasion, *while Mr. Justice was on*

vacation from his employment with SEPTA, he was observed on SEPTA property under the influence of alcohol. Mr. Justice was arrested by SEPTA police and taken to the SEPTA Medical Department by a SEPTA supervisor for a breath alcohol test. When Mr. Justice returned to work on the Monday following his vacation, he was again subjected to an alcohol test and, after the Medical Department reviewed the results of this screening, he was released to return to work.

In order to show that a particular employee is a "similarly situated member of a non-protected class," a plaintiff must establish that the employee's acts were of comparable seriousness to his own infraction, and that the employee engaged in the same conduct without such differentiating or mitigating circumstances as would distinguish the employee's conduct or the employer's resulting treatment of the employee. Anderson, 868 F.Supp. at 745. Here, there is no evidence that Mr. Justice was ever found to be under the influence of alcohol *while on duty or while driving a trolley for SEPTA*, and, as a result, Mr. Justice cannot be considered to be a similarly situated person. Because Plaintiff has failed to identify even a single similarly situated person, Plaintiff has failed to set forth sufficient evidence to establish a *prima facie* case.

2. Plaintiff's Rebuttal of Defendant's Proffered Nondiscriminatory Reason

Even assuming *arguendo* that Plaintiff were able to establish by a preponderance of the evidence a *prima facie* case, Plaintiff's disparate treatment claim must still fail. Once a plaintiff establishes a *prima facie* case,

> the burden of production switches to the defendant to assert legitimate, nondiscriminatory reasons for the allegedly discriminatory actions. Upon that showing, the burden of production switches back to the plaintiff to rebut, by a preponderance of the evidence, the defendant's reasons. This can be done either by showing that each

> reason is a recent fabrication or that discrimination is more likely than not a motivating or determinative cause for the actions.

Anderson, 868 F.Supp. at 744 (citing McDonnell Douglas, 411 U.S. at 804); Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 637-38 (3d Cir. 1993). Further, where a plaintiff establishes a *prima facie* case of disparate treatment discrimination, the defendant may nonetheless prevail on summary judgment by showing "that the plaintiff will be unable to introduce either direct evidence of a purpose to discriminate, or indirect evidence of that purpose by showing that the proffered reason is subject to factual dispute." Hankins v. Temple University, 829 F.2d 437, 440-41 (3d. Cir. 1987).

Here, Defendant has asserted a legitimate, nondiscriminatory reason for Plaintiff's termination: Plaintiff was terminated because a breath alcohol test revealed that he was under the influence of alcohol while driving a trolley for Defendant. In response, Plaintiff has not brought forth any direct or circumstantial evidence to show that this legitimate, nondiscriminatory reason for his termination is merely pretext, and that Defendant's termination of Plaintiff was the result of discrimination. Plaintiff has merely set forth a number of unsubstantiated allegations and arguments in an effort to convince this Court that there exist genuine issues of material fact as to Defendant's motivations for its actions.[3] However, the legal standard in this summary judgment

[3] Plaintiff also sets forth a significant number of immaterial factual disputes which, he argues, should preclude summary judgment. For example, Plaintiff states that Beck testified that Ron Newman, a SEPTA employee, did not arrive at Plaintiff's trolley on February 15, 1998 until after Beck had arrived, whereas Willie Brown, the union representative for Plaintiff who was called by SEPTA on February 15, 1998 regarding the incident in question, testified that Newman arrived at Plaintiff's trolley before Beck. Also by way of example, Plaintiff contends that Beck stated in his deposition that he found a woman on the trolley with Plaintiff, whereas Beck did not state in his original report in February, 1998 that he found a woman on the trolley with Plaintiff. All of the factual disputes raised by Plaintiff are of this

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context is not whether the Plaintiff's *allegations* or *arguments*, if believed, are such that a reasonable finder of fact could return a verdict in favor of Plaintiff. Rather, the standard is whether Plaintiff's *evidence*, if believed, is such that a reasonable finder of fact could return a verdict in Plaintiff's favor. See Anderson, 477 U.S. at 247-48, 255. Thus, the issue here is whether Plaintiff has set forth any *evidence* that Defendant's proffered reason for Plaintiff's termination is mere pretext, and that Plaintiff's termination was actually the result of discrimination.

Plaintiff first purports to offer statistical evidence tending to show that Defendant's actions were discriminatory. Plaintiff argues that a disproportionate number of African-American SEPTA rail operators were subjected to "reasonable suspicion" drug and alcohol tests as compared to Caucasian SEPTA rail operators. In general, a plaintiff in an individual disparate treatment case may attempt to show that a defendant's proffered reason is pretextual by offering statistics demonstrating that the defendant's action with respect to the plaintiff conformed to a general pattern of discrimination. See Bruno v. W.B. Saunders Co., 882 F.2d 760, 767 (3d Cir. 1989); Durso v. Wanamaker, 1986 WL 6753, at 2 (E.D. Pa. 1986). In this case, the evidence establishes that in 1997 and 1998, a total of twenty-one SEPTA operators from the Elmwood District were subjected to "reasonable suspicion" drug testing, of which seventeen, or 80.85%, were African-American. During this time, between 72.78 and 78.35% of operators in the Elmwood District were African-American. According to the expert report of Dr. David W. Griffin, Ph.D., offered by Defendant in support of its Motion for Summary Judgment, the slightly

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[3](...continued)
nature. Such factual disputes are clearly immaterial to Plaintiff's claims and do not preclude summary judgment. See Anderson, 477 U.S. at 248.

higher percentage of African-American employees tested, as compared to the percentage of African-American individuals in the Elmwood District employee population, is not statistically significant. Def.'s Motion, Exhibit S. Plaintiff has failed to offer any evidence to contradict Dr. Griffin's testimony, and has failed to state any plausible argument for how the undisputed statistics can be interpreted to establish a pattern of discrimination.

Plaintiff next disputes Defendant's allegations as to why Defendant was required to submit to the breath alcohol tests, contending that Defendant's allegations are false and that Plaintiff was subjected to the breath alcohol tests because of his race. Defendant, on the other hand, contends that Plaintiff was required to submit to the breath alcohol tests because Defendant had reasonable suspicion to believe that Defendant was under the influence of alcohol while operating a SEPTA trolley. According to Defendant, earlier in the day on February 15, 1998, two passengers complained to SEPTA personnel that Plaintiff was operating his trolley in an unsafe manner, and that Beck escorted Plaintiff to the SEPTA Medical Department only after investigating the complaint in person and observing Plaintiff fail to make a full stop at a "face pointing switch" in violation of the applicable operating rules. In support of these allegations, Defendant has submitted the "Supervisor's Special Report" filled out by Beck on February 15, 1998, which states:

> The above operator [Plaintiff] was held off due to reasonable suspicion. Two passengers a black man & woman came to the dispatchers [sic] window to register a complaint. The complaint [was] that operator of vehicle #9050 A 36 Route was driving in a wild[,] reckless, [and] unsafe manor [sic]. I (Karl Beck) car #81/83 went to Eastwick Loop to interview the operator T. Tyler. At Loop Mr. Tyler failed to make full stop at face pointing switch.

Defendant's Motion ("Def.'s Motion"), Exhibit F. In addition, Defendant has submitted the deposition testimony of Karl Beck, who testified that, when he confronted Plaintiff on the day in question, Plaintiff's eyes were watery and bloodshot, and Plaintiff acted nervous and "kept putting his hands over his mouth." Def.'s Motion, Exhibit G.

In Plaintiff's Brief, Plaintiff "denies that two passengers complained to SEPTA personnel regarding the manner in which Plaintiff operated his trolley on February 15, 1998," and he contends that "[t]his is a fabrication by SEPTA." Pl.'s Brief at 2. However, the two exhibits Plaintiff cites not only fail to support his contention, but, in fact, tend to support Defendant's version of the facts. Plaintiff cites Exhibit No. 2, which is the deposition testimony of Marc DiNoia, the laboratory technician for SEPTA who administered the breath alcohol tests to Plaintiff on February 15, 1999. Mr. DiNoia's testimony does not address whether two passengers complained to SEPTA about Plaintiff's driving on that date.

Plaintiff also cites Exhibit No. 4a, although there is no exhibit 4a attached to Plaintiff's Brief. Exhibit No. 4 (to which I presume Plaintiff intended to cite) is the deposition testimony of Willie Brown, the union representative for Plaintiff who was called by SEPTA on February 15, 1998 regarding the incident in question. Pl.'s Brief, Exhibit 4. Mr. Brown testified that he received a call from Ron Newman, a SEPTA employee, who had stated that "two people had come up to the depot and expressed that they had smelled alcohol on [Plaintiff], and that he had run a couple stop signs." Id. Furthermore, Mr. Brown testified that Mr. Newman had stated that he believed Plaintiff had been drinking. In addition, Mr. Brown himself testified: "Not only did I smell [alcohol] on Tyrone, the whole room smelled of alcohol when Tyrone was in there. We

can keep going around and around with this, but Tyrone was drunk. You asked, and I'm telling you, he was drunk." Id.

Thus, although Plaintiff argues that Defendant subjected Plaintiff to the breath alcohol tests based upon Plaintiff's race, Plaintiff has not presented any evidence to support this argument or to rebut Defendant's evidence which shows that Plaintiff was subjected to the tests because Defendant had a reasonable suspicion that Plaintiff was under the influence of alcohol while driving a SEPTA trolley.[4]

Finally, Plaintiff disputes the accuracy of the breath alcohol tests, alleging that the tests were not properly administered, and that the machine was not functioning properly. Specifically, Plaintiff contends that a log book produced by Defendant shows that the automatic accuracy test on the breath alcohol machine did not occur on February 15, 1998, and that SEPTA's technician

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[4] Defendant asks this Court to apply the holding in Dykes v. SEPTA, 68 F.3d 1564 (3d Cir. 1995), to the present case. In Dykes, the plaintiff argued that SEPTA had violated the terms of the collective bargaining agreement ("CBA") between SEPTA and Local 234 by subjecting him to a drug and alcohol test without "reasonable suspicion," id. at 1568, which term was defined in the CBA, id. at 1570. The Court held that whether reasonable suspicion existed was an issue involving interpretation of the CBA, id., and, further, that under the particular language of the CBA in question, which constituted a binding contract between the plaintiff and SEPTA, id. at 1569, it should have been clear that the question of whether reasonable suspicion existed in a particular case would be considered and resolved through the grievance proceedings, which procedures were also set forth in the CBA, id. at 1570. Thus, because the question of reasonable suspicion had been explicitly considered and resolved during the plaintiff's grievance proceedings, the Court held that it should defer to the factual determination made during these proceedings as to whether reasonable suspicion existed. Id. Unlike in Dykes, the record in the present case is not explicit as to whether the issue of reasonable suspicion was addressed during the grievance proceedings. In fact, the record tends to show that Plaintiff's primary contention at that level was that the results of the breath alcohol tests were inaccurate and that he had not, in fact, been drinking. Absent an explicit indication that the issue was addressed during the grievance proceedings, I cannot conclude as a matter of law that "Plaintiff is bound by the decision at the grievance level that reasonable suspicion to test Plaintiff for drugs and alcohol existed on February 15, 1998." Def.'s Motion at 8.

did not change the mouth piece on the machine prior to administering the test to Plaintiff. The problem with Plaintiff's factual contentions as to the accuracy of the breath alcohol tests is that they are not material to the particular claim that Plaintiff has set forth in this action, namely discrimination based upon Plaintiff's race. In other words, even assuming *arguendo* that Plaintiff's evidence, if believed, were such that a reasonable fact finder could conclude that the results of the breath alcohol tests were not accurate, such evidence would not tend to make it any more likely than not that Plaintiff's termination was based upon racial discrimination. Such evidence would only support the conclusion that Plaintiff's termination might have been based, in part, on inaccurate test results. Thus, even if there are genuine issues of fact as to the accuracy of the breath alcohol tests, such factual issues are not material to Plaintiff's claims in the present action.

In short, Defendant is entitled to summary judgment on Plaintiff's disparate treatment racial discrimination claim because (1) Plaintiff has failed to set forth evidence sufficient to establish a *prima facie* case, and (2) even assuming *arguendo* that Plaintiff had set forth sufficient evidence to establish a *prima facie* case, he has not offered evidence sufficient to establish that SEPTA's proffered reason for Plaintiff's termination is subject to any factual dispute.

B. Retaliation

To advance a *prima facie* case of retaliation under Title VII, a plaintiff must show that: (1) the employee engaged in a protected employee activity; (2) the employer took an adverse employment action after, or contemporaneous with, the employee's protected activity; and (3) a causal link exists between the employee's protected activity and the employer's adverse action.

Abramson v. William Paterson College of New Jersey, 260 F.3d 265, 286 (3d Cir. 2001). In his Complaint and his Request for Appointment of Attorney, Plaintiff did not specifically allege that he was the victim of retaliation by SEPTA. Plaintiff alleged only that his "not being liked by management" may have contributed to the reason for his termination. Although *pro se* complaints must be construed liberally, Haines v. Kerner, 404 U.S. 519 (1972), a plaintiff in a civil rights case is required to plead the facts with specificity, Rotolo v. Borough of Charleroi, 532 F.2d 920 (3d Cir. 1976), and this rule applies to *pro se* complaints as well, Ressler v. Scheipe, 505 F.Supp. 155, 156 (E.D. Pa. 1981).

Even assuming *arguendo* that a liberal construction of Plaintiff's pleadings would recognize a claim for retaliation, Plaintiff has failed to produce evidence sufficient to withstand SEPTA's Motion for Summary Judgment on such a claim. In Plaintiff's Brief, which was filed after Plaintiff had retained counsel, Plaintiff does not clearly set forth the factual basis for his retaliation claim. Plaintiff states only that he "complained to Mr. Perkins, SEPTA's Supervisors' manager, that white drivers were bring treated more favorably than he was with regards to [being "written up" for "running ahead of schedule], but Mr. Perkins would say to him, 'just run late and we will pick you up.'" Pl.'s Brief at 8. Plaintiff then appears to argue that, as a result of his complaints, he was subjected to the breath alcohol tests.

Plaintiff has not provided any evidence, other than his own unsubstantiated allegations, that he, in fact, made such complaints to SEPTA. Moreover, Plaintiff has not indicated when any of these complaints were made, and, therefore, has failed to show that a causal link exists between any alleged protected activity and SEPTA's termination of Plaintiff. Thus, plaintiff has failed to make a showing sufficient to establish the existence of an element essential to his

retaliation claim, and, for this reason, summary judgment is properly granted as to this claim. See Miller v. Delaware Probation and Parole, 2002 WL 1747542, at 3 (3rd Cir. 2002).

C. Order to Compel Arbitration

In Plaintiff's Brief, Plaintiff alleges – for the first time in this action – that he seeks "an order to compel Defendant to arbitrate his wrongful discharge claim under the Collective Bargaining Agreement." Pl.'s Brief at 1. However, Plaintiff does not state, either in his pleadings or his Brief, any statutory or constitutional basis for this claim.

Under Pennsylvania state law, where an aggrieved public employee seeks an order to compel his union to arbitrate his discharge, the proper course of action is for the employee to file an equity action against his union for breach of the duty of fair representation. See, e.g., Dubose v. District 1199C, Nat. Union of Hosp. and Health Care Employees, AFSCME, AFL-CIO, 105 F.Supp.2d 403, 416 (E.D. Pa. 2000); see also, 20 Summ. Pa. Jur. 2d Employment and Labor Relations § 12:50 (2002). Plaintiff here has not alleged a breach of the duty of fair representation by Local 234. In fact, Plaintiff has not even named Local 234 as a defendant in this action. As a result, Defendant is entitled to summary judgment as to this purported claim.

IV. Conclusion

In summary, SEPTA is entitled to summary judgment as to Plaintiff's claims of discrimination and retaliation under Title VII, and as to Plaintiff's claim seeking an order compelling arbitration of his discharge by SEPTA. An order follows.

IN THE UNITED STATES DISTRICT COURT
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	:	
SEPTA,	:	
Defendant.	:	

O R D E R

AND NOW, this day of November, 2002, upon consideration of Defendant SEPTA's Motion for Summary Judgment, it is hereby ORDERED that the motion is GRANTED in full as to each of Plaintiff Tyrone Tyler's claims. Judgment is hereby entered in favor of Defendant SEPTA and against Plaintiff Tyrone Tyler. The Clerk of Court is directed to close this matter for statistical purposes.

BY THE COURT:

Legrome D. Davis